QUESTION PRESENTED

CAN A STATE COURT REQUIRE POLICE OFFICERS TO INFORM MOTORISTS, LAWFULLY STOPPED FOR TRAFFIC VIOLATIONS, THAT "YOU ARE LEGALLY FREE TO GO" OR WORDS OF SIMILAR IMPORT, PRIOR TO ENGAGING IN FURTHER CONSENSUAL INTERROGATION?

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The Fourth Amendment to the United States Constitution

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Section 14, Article I of the Ohio Constitution

The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the person and things to be seized.

STATEMENT OF THE CASE

A. Statement of Facts

This case arises from the detention and subsequent search of the vehicle of Respondent, Robert D. Robinette (hereinafter "Respondent"). Deputy Sheriff Roger Newsome (hereinafter "Newsome") of the Montgomery County Sheriff's Office stopped Respondent for a speeding violation on Interstate Route 70 in Montgomery County, Ohio, on August 3, 1992. Newsome clocked Respondent's red Firebird vehicle at a speed of 69 miles per hour in a construction zone where the speed limit had been reduced to 45 miles per hour. (Jt. App. 10-11)

Newsome approached Respondent's vehicle on the driver's side and requested his license. Respondent complied and Newsome returned to his cruiser while Respondent remained seated in his vehicle. After determining that the license was valid and, knowing that he was only going to issue a warning, Newsome returned to Respondent's vehicle and asked him to step out and to the rear of his vehicle. Respondent complied and stood in between his vehicle and the cruiser while Newsome returned to the cruiser for the sole purpose of activating a video camera. Newsome retained Respondent's license during this period. (Jt. App. 16-18) According to Newsome, the only purpose for turning on the video camera in his cruiser was because he was a member of a drug interdiction patrol, and he wanted to record his questioning of Robinette regarding drugs, weapons and contraband. (Jt. App. 19)

After activating the video camera, Newsome returned to Respondent and warned him about the speeding violation. As Newsome issued his warning, he handed Respondent's license back, but continued the conversation as follows:

> Officer Newsome: Okay. Since you live in Montgomery County, and you're almost at the end of your trip, I'm going to cut you some slack. Okay?
>
> Robinette: I didn't see the sign was dropped down.
>
> Officer Newsome: If you have been watching the news you know we've been having a lot of problems with accidents up here, one right after another. We just want to get everyone to slow down. We have been writing a lot of tickets though.
>
> *One question before you get gone: are you carrying any illegal contraband in your car? Any weapons of any kind, drugs, anything like that?* (emphasis added)

See Appendix (*State v. Robinette*, No. 92-CR-2800, Court of Common Pleas, Montgomery County, Ohio, February 26, 1993, Transcript of Videotape, Joint Exhibit A, pages 3-4).

Respondent answered "no" to Newsome's question, whereupon Newsome inquired whether all the luggage in the car belonged to him and his passenger. Respondent replied that it did. Newsome then asked whether Respondent would mind if he searched the vehicle just to make sure nothing was in there. Respondent consented, as he felt he had no choice but to comply with Newsome's request. (Jt. App. 13, 19-21, 31) Respondent and his passenger were requested by Newsome to stand in front of Respondent's vehicle and face forward while Newsome searched. (Jt. App. 13)

Newsome stated he found a small quantity of marijuana on the car's console (although no charge was ever filed) whereupon he confined Respondent and his passenger in the back seat of his cruiser and indicated that they were under investigative detention. (Jt. App. 20-21) Newsome returned to the vehicle and resumed his search. He subsequently found one-half of a methamphetamine (MDMA) pill in a plastic film container in the vehicle. Respondent was then arrested. (Jt. App. 14-15) On December 18, 1992, Robinette was indicted and charged with possession under Ohio Revised Code section 2925.11(A), felony drug abuse.

B. The Trial Court's Ruling

On February 23, 1993, Honorable John B. Kessler of the Montgomery County Common Pleas Court held an evidentiary hearing to consider Respondent's motion to suppress all evidence seized as a result of the stop of his vehicle. The trial court heard testimony from Newsome and Respondent and also viewed the videotape of the encounter.

The trial court overruled Respondent's motion to suppress. Specifically, the trial court did not consider the issue of the scope of Robinette's detention, but focused solely on the validity of his consent to search. Subsequent to this ruling, Respondent entered a plea of no contest, was found guilty, and was sentenced. Respondent then pursued his right of appeal to the Montgomery County Court of Appeals, Second Appellate District of Ohio.

C. The Court of Appeals Decision

The Montgomery County Court of Appeals, Second Appellate District reversed the decision of the trial court in its opinion entered on April 15, 1994. The court of appeals properly focused its attention on the issue of the scope of Respondent's detention. Correctly recognizing that the issue of whether Respondent was seized at the time of his purported consent was a question of law, the court specifically rejected the trial court's finding and the State's argument that Respondent was free to go once the purpose of the traffic stop had been satisfied:

> We conclude that a reasonable person in Robinette's position would not believe that the investigative stop had been concluded, and that

> he or she was free to go, so long as the police officer continued to ask investigative questions.

(Decision, p. 3) The court of appeals determined that the search resulted from an illegal detention "and the fact that Robinette, during the unlawful detention, may have consented to the search is immaterial." (Decision, p. 4)

D. The Ohio Supreme Court Decision

The State of Ohio appealed the court of appeals decision to the Ohio Supreme Court. The Ohio Supreme Court, however, upheld the court of appeals' decision, holding that:

> When the motivation behind a police officer's continued detention of a person stopped for a traffic violation is not related to the purpose of the original, constitutional stop, and when that continued detention is not based on any articulable facts giving rise to a suspicion of some separate illegal activity justifying an extension of the detention, the continued detention constitutes an illegal seizure.

State v. Robinette, 73 Ohio St.3d 650 (1995) (syllabus at 1).

In addition, recognizing the need to protect the right of Ohio motorists from purported consensual questioning during traffic stops, the Ohio Supreme Court imposed an advisory requirement upon law enforcement personnel:

> The right, guaranteed by the federal and Ohio Constitutions, to be secure in one's person and property requires that citizens stopped for traffic offenses be clearly informed by the detaining officer when they are free to go after a valid detention, before an officer attempts to engage

> in a consensual interrogation. Any attempt at consensual interrogation must be preceded by the phrase "At this time you legally are free to go" or by words of similar import.

Robinette, 73 Ohio St.3d 510 (syllabus at 2). The State of Ohio has petitioned this Court to review the above holding.

SUMMARY OF ARGUMENT

The Fourth Amendment to the federal Constitution and Section 14, Article I of the Ohio Constitution guarantee the right of the individual citizen to be secure against unreasonable searches and seizures. The issue of whether or not such a seizure has occurred is a question of law. *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). It is undisputed that automobile stops are seizures within the meaning of the Fourth and Fourteenth Amendments and, as such, are subject to limitations: "in order to justify the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant that intrusion." *Delaware v. Prouse*, 440 U.S. 648, 653 (1979); *Terry v. Ohio*, 392 U.S. 1, 21 (1968).

The Ohio Supreme Court correctly held that Respondent was still seized at the time his alleged consent to search was given to Deputy Newsome to search his vehicle. *State v. Robinette*, 73 Ohio St.3d 650 (1995). The court noted the validity of the initial seizure of Respondent for the speeding violation. However, the court determined

that the continued detention of Respondent for the sole purpose of questioning him about drugs, weapons, and contraband was entirely unrelated to the initial justification for the stop and, further, was not based upon any specific or articulable facts which would provide a basis for extending the scope of the initial seizure. *Id.* at 653. Thus, Respondent's purported consent to search his vehicle was vitiated as it was tainted by the illegal detention and was not the result of an independent act of free will. *Id.* at 654; *see Florida v. Royer*, 460 U.S. 491 (1983). The Ohio Supreme Court's holding comports with both federal and state law precedent and constitutes no error.

It was only **after** the Ohio Supreme Court held that Respondent's consent was invalid, because tainted by the illegal seizure, that the court went on to hold that an officer must advise a motorist that he is legally free to go before engaging in further interrogation of the motorist.[1] This holding is neither mandated by the Fourth Amendment or Section 14, Article I of the Ohio Constitution, nor is it prohibited by same. It represents a pragmatic response to a prevalent law enforcement technique currently being utilized in Ohio and elsewhere to turn each and every stop for a motor vehicle violation into a search

[1] The United States suggests in its Amicus brief that the determination that Respondent was unlawfully seized at the time of his purported consent is based in part upon the court's holding that an officer must advise a detained motorist that he is legally free to leave at the conclusion of the detention for the motor vehicle violation. This assertion is error. The court clearly determines the issues of the unlawful seizure and resulting tainted consent of Respondent before engaging in the analysis which forms the basis for its second syllabus holding.

for illegal drugs, weapons, and contraband, in the absence of any underlying justification for same.

The Ohio Supreme Court was correct in adopting such a requirement. The court addresses the ambiguity involved in determining at what point a valid detention transforms to a consensual encounter. The court's response necessarily takes into consideration the competing interests of a legitimate law enforcement technique versus the traveling motorist's right to continue unimpeded on his way once the reason for the traffic stop has been resolved. The requirement benefits both law enforcement officers and the traveling motorist. The requirement is not unduly burdensome and does not preclude officers from engaging in consensual encounters with motorists on the side of the road. However, the motorist will be clearly advised that the detention for the motor vehicle infraction has terminated, and he can then make his own decision whether or not to engage in further discourse with an officer.

Perhaps most importantly, the Ohio Supreme Court's holding is premised upon its own state constitution. Although Section 14, Article I of the Ohio Constitution mirrors the language found in the Fourth Amendment to the United States Constitution, this Court has repeatedly advised states that they may "construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution." *California v. Greenwood*, 486 U.S. 35, 43 (1988). Ohio has acted in accord with this Court's precedent by imposing a minimal restraint on police conduct designed to protect the traveling motorist from an unreasonable interference

with his liberty. Respondent would thus urge this Court to uphold the decision of the Ohio Supreme Court.

ARGUMENT

I. ONCE AN OFFICER CLEARS THE BASIS FOR THE INITIAL DETENTION OF A MOTORIST, THE OFFICER MUST RELEASE THE MOTORIST ABSENT ANY PARTICULARIZED SUSPICION THAT THE MOTORIST HAS ENGAGED IN OR IS ABOUT TO ENGAGE IN CRIMINAL ACTIVITY, OR THE RESULTING CONTINUED DETENTION CONSTITUTES AN ILLEGAL SEIZURE IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTION 14, ARTICLE I OF THE OHIO CONSTITUTION.

The Fourth Amendment to the United States Constitution provides that each individual has a right to be secure against unreasonable searches and seizures. The Fourth Amendment thus guarantees to each individual " '[t]he security of one's privacy against arbitrary intrusion by the police.' " *Coolidge v. New Hampshire*, 403 U.S. 443, 453 (1971). As recognized by the late Mr. Justice Frankfurter:

> The security of one's privacy against arbitrary intrusion by the police – which is at the core of the Fourth Amendment – is basic to a free society. It is therefore implicit in "the concept of ordered liberty" and as such enforceable against the States through the Due Process clause.

Wolf v. Colorado, 338 U.S. 25 (1949). The Ohio counterpart to the Fourth Amendment is found in Section 14, Article I of the Ohio Constitution, which likewise secures an individual's right to be free from unreasonable searches and seizures.

The issue of whether or not a seizure has occurred is a question of law. *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). A person has been "seized" within the purview of the Fourth Amendment "only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Id.* This Court has recently held that the ultimate questions of reasonable suspicion to stop and probable cause to make a warrantless search should be reviewed de novo. *Ornelas v. United States*, No. 95-5257 (decided May 28, 1996). Thus, an independent examination of the facts, findings, and the record may be undertaken by this Court to "determine for itself whether in the decision as to reasonableness the fundamental – i.e., constitutional – criteria established by this Court have been respected." *Ker v. California*, 374 U.S. 23, 24 (1963).

A. Once the initial basis for detaining a motorist has been resolved, an officer is required to release the motorist without further questioning unless the officer has a reasonable and articulable suspicion which would have justified further detention of the motorist.

Respondent was stopped by Deputy Newsome for a speeding violation. It is beyond dispute that this is an investigatory stop, which has been held by this Court to constitute a "seizure" within the meaning of the Fourth

and Fourteenth Amendments. *See Delaware v. Prouse*, 440 U.S. 648, 653 (1979); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975). People are not shorn of their Fourth Amendment rights "when they step from the sidewalks into their automobiles." *Prouse*, 440 U.S. at 663. While this Court has recognized that the purpose of such stops is limited and the resulting detention brief (when compared to formal custodial interrogation), this Court remains mindful of the proscriptions contained in the Fourth Amendment which "impose a standard of reasonableness upon the exercise of discretion by government officials." *Id.* at 654-55. This Court has also noted that such stops involve a show of authority, interfere with the motorist's freedom of movement, and may create substantial anxiety. *Id.* at 657.

The law with regard to investigatory stops was established by this Court in the seminal case of *Terry v. Ohio*, 392 U.S. 1 (1968). *Terry* represented a great departure from this Court's prior requirement that in order to detain an individual, a police officer needed to have probable cause to suspect criminal activity. *See Dunaway v. New York*, 442 U.S. 200, 207-09 (1979) (prior to *Terry*, any restraint of a person amounting to a seizure was invalid unless justified by probable cause). The majority in *Terry* recognized that some departure was necessary in order to safeguard law enforcement personnel in carrying out their functions. *Terry*, 392 U.S. at 23-24. However, the exception is a limited one: The central tenet of *Terry* provides that "in order to justify the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with the rational

inferences from those facts, reasonably warrant that intrusion." *Terry* , 392 U.S. at 21.

Since *Terry*, it has been acknowledged by this Court that a traffic stop is more analogous to an investigative detention or "*Terry* stop" than a custodial arrest. *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984). The reasons for this analogy are twofold: (1) the presumptively "temporary and brief" nature of the stop; and (2) the circumstances, including the exposure to public view, are not such as to make the motorist believe he is "completely at the mercy of the police." *Id.* at 437-38; *see also Prouse*, 440 U.S. at 653. However, the Court does acknowledge that a traffic stop "significantly curtails" the "freedom of action" of a motorist. *Berkemer*, 468 U.S. at 436.

Terry requires a dual analysis to determine: (1) whether the police officer's action was justified at the inception of the stop, and (2) whether the officer's action at issue was reasonably related in scope to the circumstances which justified the interference in the first place. *Terry*, 392 U.S. at 20; *see also Pennsylvania v. Mimms*, 434 U.S. 106, 113-14 (1977) (Marshall, J., dissenting). Evidence "may not be introduced if it was discovered by means of a seizure and search which were not reasonably related in scope to the justification for their initiation." *Terry*, 392 U.S. at 29.

It is conceded in this case that the initial stop of Respondent was justifiable. Newsome pulled Respondent over for a speeding violation: he was traveling at a speed of 69 miles per hour in a 45 mile per hour construction zone on an interstate highway. (Jt. App. 11) Thus, Newsome's actions comport with the first inquiry of the Terry

analysis: Newsome had a reasonable and articulable suspicion that Respondent was violating the speed limit. However, Newsome's subsequent actions in removing Respondent from his vehicle, inquiring about illegal contraband, and his request to search Respondent's vehicle fail to comport with the second inquiry of the Terry analysis.

From the inception of the stop, Newsome testified that he was only going to issue a warning citation to Respondent. (Jt. App. 18) Therefore, when Newsome returned to Respondent's vehicle after checking his license, he had fully investigated the basis for the traffic infraction and had resolved the basis for the stop. All Newsome needed to do was to return Respondent's license, issue his warning, and inform him that he was free to go on his way. However, as noted by the Ohio Supreme Court:

> Instead, for no reason related to the speeding violation, and based on no articulable facts, Newsome extended his detention of Robinette by ordering him out of the vehicle. Newsome retained Robinette's license and told Robinette to stand in front of the cruiser. Newsome then returned to the cruiser and activated the video camera in order to record his questioning of Robinette whether he was carrying any contraband in the vehicle.

State v. Robinette, 73 Ohio St.3d 650, 653 (1995). It is at this point that Newsome oversteps his authority and arbitrarily intrudes upon Respondent's privacy. The mere fact that Newsome had a reasonable and articulable suspicion that Robinette had been speeding did not entitle him "to

turn a routine traffic stop into a fishing expedition for unrelated criminal activity." *Id.* at 655. Once Newsome had resolved the basis for the stop of Respondent, he was required to release him, with or without issuing a citation, in the absence of any further reasonable suspicion that he was transporting drugs, weapons, or contraband. The record is simply devoid of any testimony from Newsome which provides a reasonable basis for his continued detention of Respondent.

B. The continued detention of a motorist after the initial basis for a traffic stop has been investigated and cleared constitutes an unreasonable seizure in contravention of the Fourth and Fourteenth Amendments to the United States Constitution and Section 14, Article I of the Ohio Constitution.

The Fourth Amendment prohibits even momentary seizures without reasonable and objective grounds for doing so. *Florida v. Royer*, 460 U.S. 491, 498. *Terry* mandates that even where a temporary detention is permissible, that detention is severely limited. As unequivocally set forth by this Court, "reasonable suspicion of criminal activity warrants a temporary seizure for the purpose of questioning limited to the purpose of the stop." *Royer*, 460 U.S. at 498 (citing *United States v. Brignoni-Ponce*, 422 U.S. 873, 881-82 (1975)). Thus, unless a basis for further detention and investigation develops during the initial detention, a police officer must circumscribe his questioning to the basis for the original stop. Further, "the investigative detention must be temporary and last no longer

than is necessary to effectuate the purpose of the stop." *Id.* at 500.

These are not novel rules of law. Their justification may be found in the myriad of cases which have come before this Court on the issue of unreasonable searches and seizures. At bottom, however, the justification for such rules requires a balancing of the individual's right to be free of arbitrary government intrusion against the government's intrusion upon this right. This Court must remain mindful, however, of the potential for abuse of such detentions. If police officers are allowed to convert all *Terry* stops into "consensual" interrogations about matters which are unrelated to the basis for the initial detention, then there is no meaningful limitation left to *Terry* and the exception thus swallows the rule. *See Royer*, 460 U.S. at 510 (Brennan, J., dissenting in the result). The time and scope limitations imposed by *Terry* no longer exist to protect the individual from arbitrary government intrusion upon his protected Fourth Amendment rights.

The danger of abuse, specifically with regard to traffic stops, has been noted by other courts. For example, Sixth Circuit authority allows a police officer to pull over vehicles for traffic infractions, however slight, even if the officer's real purpose for the stop is the hope that narcotics or other contraband may be found as a result of the stop. *See United States v. Ferguson*, 8 F.3d 385 (6th Cir. 1993) (en banc), *cert. denied*, 115 S.Ct. 97 (1994). Such broad authority was, however, not enough to sustain the search of a vehicle in *United States v. Mesa*, 62 F.3d 159 (6th Cir. 1995). In *Mesa*, the defendant was stopped for speeding. The officer requested Mesa's license, which she had to retrieve from the trunk of her Cadillac vehicle.

Rather than having her return to her own vehicle, the officer instructed Mesa to sit in the back of the cruiser while he ran a license check. Once in the cruiser, she was informed that only a warning would be issued. Mesa then answered a number of questions regarding her age, license and destination. The officer exited his cruiser and approached Mesa's vehicle to ask Mesa's passenger a few questions and then returned to the cruiser. He finished writing his warning citation, and Mesa signed it. Instead of allowing Mesa to exit his cruiser, however, he then asked Mesa additional questions, totally unrelated to the initial traffic stop but, rather, focusing on whether Mesa had any weapons or drugs in her car. Mesa responded negatively, but the officer asked whether she would mind if he searched. Mesa consented and later signed a written consent to search form.

Judge Guy, writing for the Sixth Circuit, found this search to constitute an abuse of police authority. In Judge Guy's words:

> The rationale behind our decision in Ferguson was not to authorize "fishing expeditions," no matter how well-intentioned, by police agencies. Rather, it was premised on the proposition that the judicial branch of government should not dictate to the executive branch the manner in which it carries out its enforcement function as to the laws passed by the legislature. Since we have extended this authority to the broadest extent possible, however, we have a duty to see that the authority is not abused. Under the circumstances presented here, we feel that the authority was abused. As we will spell out in more detail, if this search can pass muster, then police authorities have a license to search almost

> every vehicle that they have reason to stop on the highway, with or without consent of its owner or occupant.

Id. at 162. The court specifically found that once the purpose of the initial traffic stop had been concluded, the officer could not detain the driver further "unless something that occurred during the traffic stop generated the necessary reasonable suspicion to justify a further detention." *Id.* The court found insignificant the officer's claimed discrepancy between Mesa's and her sister's explanation as to where they were traveling. *Id.* Further, the court found that the alleged nervousness of Mesa was an insufficient basis upon which to support a further detention, especially given the fact that Mesa was seated in the backseat of the officer's cruiser from the inception of the stop. Judge Guy thus concluded that this was a simple case "in which the officer crossed over the line of permissible conduct subsequent to a legitimate traffic stop. . . . " *Id.* at 163.

Newsome stepped over this same "line of impermissible conduct" when he removed Respondent from his vehicle for the sole purpose of conducting his questioning of him with regard to illegal contraband. Newsome had cleared the basis for his initial stop of Respondent upon running a check of his license and finding no outstanding violations. His testimony indicated that he intended only to give a warning to Respondent from the time he stopped him. (Jt. App. 18) He indicated that intent to Respondent on videotape. Unlike *Mesa*, Newsome did not testify as to any facts that aroused his suspicion about Respondent such as would warrant a further detention. Therefore, once the warning was given and, in the

absence of any particularized suspicion that Respondent was engaged in other criminal activity, Newsome was required to release him.

Newsome's conduct in this case alone, however, does not tell the entire story. Newsome's actions were also at issue in the case of *State v. Retherford*, 93 Ohio App.3d 586 (Ohio Ct. App. 1994). In *Retherford*, Newsome admitted to requesting consent to search vehicles "as a matter of course" in approximately 786 traffic stops in 1992 **alone**. *Id.* at 594 n.3. Newsome further proclaimed that "all" of the cars he stopped for a traffic violation while he was on drug interdiction patrol would be searched "more so for any other reason the fact that I need the practice, to be quite honest." *Id.* at 596. The Second Appellate District of Ohio specifically noted that police agencies in Ohio were instructing officers to seek consent routinely of individuals stopped for motor vehicle violations to search for drugs, weapons, and money "even when the officer has little or no suspicion that the occupants of the vehicle are engaged in any criminal activity whatsoever, or that the vehicle itself contains any contraband." *Id.* at 593-94. The stop of Respondent is but one of Newsome's stops in 1992. If this officer's actions are illustrative of other police agency practices, it requires little imagination to determine that this figure multiplied by the numerous law enforcement agencies across the nation who utilize this tactic yields a staggering number of citizens being "asked to relinquish their privacy rights in the name of 'voluntary cooperation' with the government. . . . " *Id.* Indeed, the fact that thirty-six states have joined in the

Amicus Brief of the Ohio Attorney General may be indicative of just how widespread the intrusion upon the traveling public has become.

The Ohio Supreme Court and the Second Ohio Appellate District have recognized this tactic exactly for what it is. In the words, of the Second Ohio Appellate District:

> [the officer's] "freeing" of [Robinette] was merely a pre-arranged ploy to attempt to end the "seizure" so that the Deputy could interrogate [Robinette] and obtain [his] consent to search based on nothing more than the slightest "inchoate" and "unparticularized" hunch that [he] might be transporting contraband.

Id. at 599. Searches based on such inchoate and unparticularized suspicions and hunches are the exact evils sought to be deterred by the Fourth Amendment. *See Terry*, 392 U.S. at 27. Thus, unlawful detentions that result in such searches and seizures contravene the Fourth Amendment's proscription against unreasonable searches and seizures: "The very thought of American citizens, not suspected of any wrongdoing, being asked by the police to search their cars and luggage before exercising their right to drive the highways of this state is clearly repugnant to American institutions and ideals." *Retherford*, 93 Ohio App.3d at 596.

In times of widespread drug use and drug trafficking, the values sought to be protected by the Fourth Amendment might seem to be nothing more than esoteric or extravagant ideals when weighed against the societal pressure to halt such activity. *See Coolidge v. New Hampshire*, 403 U.S. at 455. This pressure makes it easy for law

enforcement politicos to urge sacrifice of these fundamental constitutional values in the war against drugs. It is equally clear that many traffic stops, such as the stop of Respondent, never come to the attention of the courts. Indeed, it is only where questionable practices are subjected to constitutional scrutiny through the judicial process that cases make it to this Court for review. However, this does not diminish the importance of protecting these fundamental constitutional values. As so aptly stated by Mr. Justice Jackson:

> But the right to be secure against searches and seizures is one of the most difficult to protect. . . . Only occasional and more flagrant abuses come to the attention of the courts, and then only those where the search and seizure yields incriminating evidence and the defendant is at least sufficiently compromised to be indicted. If the officers raid a home, an office, or stop and search an automobile but find nothing incriminating, this invasion of the personal liberty of the innocent too often finds no practical redress. There may be, and I am convinced that there are, many unlawful searches of homes and automobiles of innocent people which turn up nothing incriminating, in which no arrest is made, about which courts do nothing, and about which we never hear.

Brinegar v. United States, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting). It is for these compelling reasons that this Court must scrutinize the type of tactics being utilized by law enforcement personnel in the name of voluntary cooperation. It is for these same reasons that once an officer has investigated and cleared the basis for an initial traffic detention that the detained individual must be

released in the absence of any further reasonable and particularized information which would justify further detention. Fourth Amendment values must not be forsaken in order that the government might "more effectively wage a 'war on drugs' ". *See Florida v. Bostick*, 501 U.S. 429, 439 (1991).

II. AT THE TIME OF RESPONDENT'S PURPORTED CONSENT TO SEARCH, THE OFFICER DID NOT HAVE A REASONABLE JUSTIFICATION TO CONTINUE THE DETENTION OF RESPONDENT.

It is undisputed that Newsome did not have any reasonable and articulable suspicion to justify Respondent's removal from his vehicle and to subsequently question him about drugs, weapons, or contraband. There was absolutely no evidence of any unlawful activity other than a speeding violation. There was no testimony by Newsome at the suppression hearing that Respondent fit any drug courier profiles, no testimony that anything about him made Newsome suspicious that he was transporting drugs or contraband, nor was there any physical evidence at the scene that Respondent was a drug trafficker. The only testimony from Newsome was that he routinely asked permission to search **all** vehicles he pulled over for motor vehicle violations.[2]

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[2] *Compare Retherford, supra*, wherein Newsome testified that there were several indicators which made him suspicious that Retherford was carrying contraband, e.g., luggage in the back seat, Retherford's nervousness, and the fact that she was traveling from Cincinnati to Port Clinton, Ohio. 93 Ohio App.3d at 591. Ironically, the *Retherford* court also noted that in another

A routine practice is not a permissible basis upon which to seek to detain motorists in order to impermissibly broaden the scope of an investigative detention. Rather, a reasonable and articulable suspicion of criminal activity is required. General suspicion is insufficient. *Reid v. Georgia*, 448 U.S. 438 (1980) (per curiam). "[D]emand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence." *United States v. Cortez*, 449 U.S. 411, 418 (1981); *see also Terry*, 392 U.S. at 21 n.18. In the absence of such specificity of information, the state was required to prove that Respondent's consent was, in fact, voluntary and not the result of an unreasonable detention.

A. Consent tainted by an unlawful detention is invalid as a matter of law.

Consent produced as a result of an illegal detention is vitiated as a matter of law. *Florida v. Royer*, 460 U.S. 491, 507-08. "Statements given during a period of illegal detention are inadmissible even though voluntarily given if they are the product of the illegal detention and not the result of an independent act of free will." *Id.* at 501. It is Respondent's contention that his consent to search is invalid as a matter of law, pursuant to *Royer*, because he was being illegally detained by Newsome at the time his purported consent was given. The state can overcome this invalidity **only** through proof that the consent was not

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case involving this same officer, his suspicions were aroused because the detainee's luggage was located in his trunk! *Id.* n.1.

the product of an illegal detention but, rather, was Respondent's independent act of free will. *Id.* While this Court has opined that there is no "litmus-paper test" for distinguishing a consensual encounter from an illegal seizure, one point is crystal clear: where the validity of a search rests on consent, the state bears the burden of "proving that the necessary consent was obtained and that it was given freely and voluntarily." *Id.*; *see also Bumper v. North Carolina*, 391 U.S. 543 (1968). This burden of proof "cannot be discharged by showing no more than acquiescence to a claim of lawful authority." *Bumper*, 391 U.S. at 548-49.

A police stop of a motor vehicle constitutes a significant intrusion and is clearly a seizure within both the meaning of the Fourth Amendment and the Ohio Constitution. Newsome activated his lights and siren in order to pull Respondent over. Respondent was questioned as to his travels and was subsequently issued a warning citation for speeding. A reasonable person certainly would not have felt free to walk away during this period of time. What subsequently transpired between Respondent and Newsome, however, is distinct from cases in which the encounter between the officer and the citizen can be characterized as "consensual".

This Court has noted that an officer is free to ask questions so long as he does not convey the message that compliance with his request is mandatory or required. *Bostick*, 501 U.S. at 437; *see also Mendenhall*, 446 U.S. at 554 (seizure may be indicated by "use of language or tone of voice indicating that compliance with the officer's

request might be compelled"). The message of compliance, however, is the exact message conveyed by Newsome to Respondent:

> Officer Newsome: Okay. Since you live in Montgomery County, and you're almost at the end of your trip, I'm going to cut you some slack. Okay?
>
> Mr. Robinette: I didn't see the sign was dropped down.
>
> Officer Newsome: If you have been watching the news you know we've been having a lot of problems with accidents up here, one right after another. We just want to get everyone to slow down. We have been writing a lot of tickets, though.
>
> One question before you get gone: are you carrying any illegal contraband in your car? Any weapons of any kind, drugs, anything like that? (emphasis added)

See App. at pp. 2-3. The clear impact of Newsome's question is that **before** Respondent is free to go, he must answer this question:

> Newsome tells Robinette that before he leaves Newsome wants to know whether Robinette is carrying any contraband. Newsome does not ask if he may ask a question, he simply asks it, implying that Robinette must respond before he may leave. The interrogation then continues. Robinette is never told that he is free to go or that he may answer the question at his option.

Robinette, 73 Ohio St.3d at 654-55.

From Respondent's point of view, it appears unrealistic for Petitioner to argue that Respondent, as a reasonable person, would have felt free to leave at this point. Indeed, it "strains credulity" to think that a motorist, after being pulled over by an armed and uniformed officer, would feel at liberty to ignore the police presence and walk away when confronted by investigatory questions about illegal contraband, followed by a request to search his vehicle for same. *See Retherford*, 93 Ohio App.3d at 599. It is undisputed that Newsome never informed Respondent that he was free to leave. "Certainly few motorists would feel free . . . to leave the scene of a traffic stop without being told they might do so." *Berkemer*, 468 U.S. at 436.

It becomes clear when one views the videotape of this encounter that at the time Newsome begins to issue his warning to Respondent, there is one unending conversation, without any break between the warning for speeding, Newsome's comments about the amount of accidents that had occurred along the particular stretch of highway, the questioning about illegal drugs, weapons, or contraband, and the request for consent to search the vehicle. Petitioner would rely on Respondent's admission that he thought he was free to leave at the time the officer handed his license back. (Jt. App. 29) Respondent's subjective belief was instantaneously replaced with the contrary thought when Newsome continued his inquiry without interruption: "Before you get gone . . . . " Respondent further testified that he felt he could **not** decline the officer's request to search his vehicle, thus belying Petitioner's claim that Respondent knew he was

free to go at the time his license was returned to him. (Jt. App. 27, 31)

The tape clearly reveals that Newsome did not cease speaking to Respondent from the time he handed him his license until the request for consent was made. The entire exchange, including Newsome's inquiry and request for consent to search, was completed in a matter of seconds, "a time period clearly insufficient by itself to break the causal link and to allow free will to flourish." *United States v. Sandoval*, 29 F.3d 537, 544 (10th Cir. 1994). Respondent never made any move to leave during this time. Thus, it is highly unlikely that Respondent or any other reasonable person who is being addressed by a police officer feels free to take his license and walk away and leave the officer there to prattle on to thin air.

Much has been made of Newsome's posture, his tone of voice, and the fact that he requested, not ordered, Robinette to consent. If Newsome had ordered Respondent to consent, the consent would not be voluntary as it would clearly constitute no more than acquiescence to a show of lawful authority. *Bumper, supra*. It is undisputed that Newsome is a police deputy, complete with uniform and gun who had legally pulled Respondent over for speeding. It is not necessary that an officer be belligerent or overbearing or have his gun trained on the motorist for a court to find that a seizure has occurred. Indeed, one corollary to the assertion that Newsome was not overbearing is to suggest that it is permissible for an officer to interrogate a detained motorist about drugs, weapons, and contraband and request consent to search his vehicle with absolutely no underlying basis, so long as the officer presents an unthreatening demeanor to the

detainee. To accept such a proposition is to erode the protections of the Fourth Amendment to a point where they become nonexistent.

When Newsome completed his warning, all he had to do was hand Respondent's license back and inform him he was free to go, something Newsome admitted doing many times before in stops like this. *See Retherford*, 93 Ohio App.3d at 591. Instead, he removed Respondent from his vehicle and required him to stand to the rear of his vehicle while he returned to his cruiser to activate the video camera. He then asked Respondent questions about drugs, weapons, and contraband, beginning with "Before you get gone . . . . ", implying that Respondent must respond to his questions before he can get on his way. The United States urges that this indicated that Newsome's questioning would soon cease. But, therein lies the admission that Respondent was **not** free to go nor, as a reasonable person, could he feel that he was free to go at the time the alleged consent was given. Thus, the Ohio Supreme Court was correct in affirming the legal conclusion of the court of appeals that the consent was not voluntary but, rather, was tainted by the continuing unreasonable and illegal detention. The finding is supported by the fact that Respondent never made any attempt to leave nor was there any significant break in the action surrounding the stop which would purge the taint of the illegal detention.

B. Even if this Court can reasonably accept the premise that Respondent consented to the search of his vehicle, the alleged consent was no more than a submission to a lawful authority and, as such, is insufficient to establish an unequivocal, specific and voluntary consent.

Even if this Court accepts Petitioner's claim that Respondent "consented" to the search of his vehicle, this consent is vitiated because it was not unequivocally, freely and voluntarily given. Respondent merely acquiesced in the officer's suggestion to search his vehicle. Acquiescence indicates passivity or a lack of resistance, rather than an independent act of free will.

Schneckloth mandates a totality of circumstances test when looking at the purported voluntariness of consent. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). *Bumper* states that consent is not voluntary when it is the mere submission to a show of lawful authority. Petitioner argues that the entire exchange between Newsome and Respondent with regard to illegal activities was a consensual encounter. Petitioner places great weight on the fact that Respondent was a 38-year-old college graduate, and invites this Court to presume that as a hypothetical reasonable person, he thus knew all of the constitutional rights he could assert in the face of Newsome's request. Petitioner also invites this Court to conclude that Respondent knew he was free to leave at the time he was questioned about illegal drugs and his "consent" obtained. Such a conclusion is unwarranted.

Newsome's own testimony reveals that the only reason the videotape was activated in this case was to record his questioning of Respondent as to drugs, weapons, and

contraband. (Jt. App. 19-20) The actual videotaped sequence of the speeding warning, the questioning about drugs, weapons, and contraband, and the request for consent constitutes one, uninterrupted sequence, during which at no time could Respondent reasonably have felt free to ignore the officer and walk away. The videotape demonstrates the fallacy of the Petitioner's argument, as well as the error of the trial court's finding that the officer had made it clear to Respondent that the traffic matter was concluded. Petitioner points out that Respondent testified he thought he was free to leave because the officer had handed him his license and informed him he was getting a warning for speeding. However, with no lapse in the conversation, Newsome launches into a question totally unrelated to a speeding violation. Respondent's response: he was shocked and surprised, **and felt that he was not free to decline the officer's request for consent to search.**[3] (Jt. App. 26-27, 31) (emphasis added).

If, pursuant to *Schneckloth*, one is to examine the totality of circumstances in this case, that examination must include the following factors: (1) Respondent was detained solely for a speeding violation; (2) a check of Respondent's license revealed no outstanding violations; (3) Respondent was removed from his vehicle for no reason other than to record Newsome's drug interdiction activities; (4) Newsome testified to no factors which aroused his suspicions that Respondent was carrying

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[3] *Compare Retherford, supra*, wherein Newsome specifically testified that he informed Retherford that she was free to go before requesting consent to search. 93 Ohio App.3d at 591.

drugs, weapons, or contraband; (5) Newsome's questioning and request for consent came while Respondent was still being detained by the officer on the side of the road and after he was asked to exit his vehicle so the questioning could be videotaped; (6) the questioning and request for consent occurred after the initial basis for the traffic stop had been resolved; (7) the request from Newsome was not presented to Respondent as a real option but, rather, Newsome infers that he must answer before he leaves Newsome's presence; (8) the request for consent to search follows immediately upon the heels of a question about illegal drugs, weapons, and contraband, a question totally unrelated to the purpose of the original traffic stop; (9) the questioning and request to consent are made without the benefit of any advice to Respondent that he was free to go, could refuse to answer any questions, or could refuse to consent to a search; and (10) the search is undertaken by Newsome without any written consent to search form. These are the facts that Petitioner and Amici want to ignore, because a careful examination of these facts reveals that what the state claims is a totally "consensual" encounter is nothing more than a subterfuge engaged in by law enforcement officers in order to subtly coerce detained motorists into granting consent to search their vehicles.

This "ploy" was very well rehearsed as Newsome was trained to give a motorist's documents back while, at the same time, continuing a "casual conversation" which invariably culminated with questioning about drugs, weapons, or contraband, followed immediately by a request to search the motorist's vehicle. *See Retherford*, 93 Ohio App.3d at 590-91. Here, as in *Royer*, the primary

goal of Newsome's conversation was **not** in having such a conversation with Respondent but, rather, in investigating the contents of Respondent's vehicle, a matter totally unrelated to the purpose of the original stop and for which there was no underlying basis. *Royer*, 460 U.S. at 505. The motorist, who may have believed she was free to go a moment before, is suddenly confronted with a request to search for no reason other than "routine".

Petitioner seizes upon this momentary illusion of freedom to justify what subsequently occurred as a totally consensual encounter. However, the phrasing of the question implies that the motorist cannot leave before answering. The request for consent to search clearly implies the officer's disbelief of the motorist's negative answer. The officer, who moments before issued a warning or citation for a motor vehicle violation, retains the upper hand and the accoutrements of authority during this time. It is highly unlikely that the reasonable person in this situation would feel free to leave. The resulting "consent," if obtained, thus constitutes no more than submission to the officer's authority, insufficient as a matter of law to constitute an unequivocal and freely given consent.

III. THE REQUIREMENT OF ADVICE FROM A LAW ENFORCEMENT OFFICER TO A DETAINED MOTORIST AT THE CONCLUSION OF A TRAFFIC STOP THAT THE MOTORIST IS LEGALLY FREE TO GO IS NOT PROHIBITED UNDER THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION OR SECTION 14, ARTICLE I OF THE OHIO CONSTITUTION.

The Ohio Supreme Court took the opportunity in *Robinette* to establish what it termed a "bright line"

between the conclusion of a valid seizure and the beginning of a consensual exchange in the context of a motor vehicle stop. The underlying rationale for this rule was expressed by the court as follows:

> The transition between detention and a consensual exchange can be so seamless that the untrained eye may not notice that it has occurred. The undetectability of that transition may be used by police officers to coerce citizens into answering questions that they need not answer, or to allow a search of a vehicle that they are not legally obligated to allow.
>
> . . .
>
> Most people believe that they are validly in a police officer's custody as long as the officer continues to interrogate them. The police officer retains the upper hand and the accouterments of authority. That the officer lacks legal license to continue to detain them is unknown to most citizens, and a reasonable person would not feel free to walk away as the officer continues to address him.

Robinette, 73 Ohio St.3d at 654-55. The court thus held that an officer is required to inform a detained motorist that he or she is legally free to go at the conclusion of a traffic stop. The requirement imposed upon law enforcement officers is not repugnant to either the federal Constitution or the Ohio Constitution. It merely provides a demarcation between the detention and any potential subsequent consensual exchange.

A. The warning requirement imposed by the Ohio Supreme Court does not create an impermissible single factor test.

Petitioner and Amici assert that the warning requirement imposed by the Ohio Supreme Court creates a single factor test. Thus, if the warning is not given, any consent obtained by an officer will be irrebuttably presumed to be involuntary. In Petitioner's opinion, the rule eviscerates the consensual encounter doctrine. That argument should initially be dispelled by the Ohio Supreme Court opinion itself as the court noted the importance of consensual encounters as a constitutional, investigative tool. *Robinette*, 73 Ohio St.3d at 655. The court held that where a motorist has been seized pursuant to a traffic stop, and the purpose of the traffic stop has been completed, the motorist must be advised that he or she is legally free to go **before** any attempt at consensual interrogation begins. The ruling is a pragmatic response to a technique being utilized routinely by law enforcement officers in Ohio and across the nation to illegally broaden the scope of valid detentions for traffic violations, a technique designed to turn every motor vehicle stop into a search for illegal drugs, weapons, and contraband.

Nevertheless, Petitioner and Amici argue that this Court has consistently rejected bright line rules in the context of Fourth Amendment jurisprudence. In support of their arguments, Petitioner and Amici rely upon cases in which they maintain such rules were struck down by this Court. *See Florida v. Bostick*, 501 U.S. 429 (1991); *Michigan v. Chesternut*, 486 U.S. 567 (1988). This Court did strike down overbroad holdings of other State courts in both of these cases. However, these were cases in which

the respective state court holdings involved all-or-nothing propositions of law.[4] For example, in *Bostick*, this Court struck down the holding of the Florida Supreme Court that **all** bus searches were unconstitutional seizures under the Fourth Amendment.[5] In *Chesternut*, this Court struck down a Michigan Court of Appeals' holding that **all** investigatory pursuits were seizures for purposes of Fourth Amendment protections.

The Ohio Supreme Court's holding recognizes the constitutional precedents of this Court that an officer cannot legally detain a motorist, in the absence of any

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[4] In addition, unlike prior cases, the case at bar involves a lawful seizure followed by a seamless transition to a full blown search **unrelated** to the purpose of the seizure. Unlike prior precedent, the issue before the Court is whether Respondent's unlawful detention thereby rendered his subsequent "consent" invalid.

[5] There is a further important distinction between *Bostick* and the case at bar. In *Bostick*, no factual determination was made by the Florida Supreme Court as to whether or not a seizure had occurred, independent of its conclusion that solely because the confrontation arose on a bus, there was an automatic seizure. The Ohio Supreme Court, however, made an independent factual determination that Respondent was seized at the time his purported consent was given. Only after this determination was made did the court move on to consider the inherent ambiguity involved in a traffic stop where the detained motorist is confronted with questions about illegal contraband followed by a request to search his vehicle. It is at this point that the Ohio Supreme Court opts to afford protection to the motorist to secure him against an unreasonable search by placing a requirement on the officer to advise the motorist he is legally free to travel on prior to engaging in any further interrogation for which the officer has no basis other than a "hunch".

particularized suspicion as to further criminal activity. The underpinning of its holding necessarily realizes that although the officer's action may have been justifiable at its inception, e.g., a moving violation, the officer's subsequent actions must be sufficiently related in scope to the circumstances which justified the officer's interference in the first place. Absent this relationship or any new and particularized information that warrants further detention, an officer is thus required to inform the motorist that he is free to go. The officer may then choose to engage in a further exchange with the motorist, question the motorist about contraband, or request to search the motorist's vehicle. However, the motorist has now been alerted and does not have to question the fact that he need not remain to speak further with the officer if he does not desire to do so.

Petitioner attempts to liken this case exclusively to *Schneckloth* in claiming that a right to refuse consent has never been found to be the only factor in assessing the voluntariness of consent. This proposition entirely misses the rationale behind the holding in *Robinette*. The requirement set forth by the Ohio Supreme Court is not a test for assessing the voluntariness of consent. Therefore, the required statement does not run afoul of *Schneckloth*. The advice merely informs the motorist that he is free to go. The advice is to the individual himself and is therefore not akin to the *per se* rules struck down in *Bostick* and *Chesternut* that all police action of a certain type constitutes an illegal seizure.[6] The question is not, as Petitioner

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[6] The Ohio Supreme Court recognized both the compelling interest of the citizen and the officer in a situation where, once

suggests, whether the Fourth Amendment mandates that such a statement be made by the officer but, rather, whether such advice is consistent with the constitutional criteria previously advanced by this Court.

The holding is not designed to supplant the totality of circumstances test of *Schneckloth* with a single, bright-line rule for assessing the voluntariness of consent. If that were the case, the Ohio Supreme Court could have mandated a detailed warning, akin to *Miranda*, encompassing the right to leave the scene, the right to refuse to answer further questions, and the right to refuse to consent to a search of the vehicle. This is not a "right to refuse consent" holding. Respondent would note, however, that this Court has consistently found significant the fact that a person was informed of his right not to consent in assessing the voluntariness of that consent. For example, in *United States v. Mendenhall*, Justice Stewart opined:

> [I]t is especially significant that the respondent was twice expressly told that she was free to decline to consent to the search, and only thereafter explicitly consented to it. Although the Constitution does not require "proof of knowledge of a right to refuse as the *sine qua non* of an effective consent to a search" [Schneckloth v. Bustamonte, supra], at 234 (footnote omitted), such knowledge was highly relevant to the determination that there had been consent. And, perhaps more important for present

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lawfully detained for a traffic offense, the officer broadens the scope of the inquiry. The initial contact, although valid, is not consensual, the motorist having been "ordered" to the side of the road by lights and sirens.

> purposes, the fact that the officers themselves informed the respondent that she was free to withhold her consent substantially lessened the probability that their conduct could reasonably have appeared to her to be coercive.

446 U.S. at 558-59. *Mendenhall* was distinguished in *Royer* as follows:

> In *Mendenhall*, no luggage was involved, the ticket and identification were immediately returned, and officers **were careful to advise that the suspect could decline to be searched.** Here, the officers seized Royer's luggage **and made no effort to advise him that he need not consent to the search.** (Emphasis added)

Royer, 460 U.S. at 503-04 n.9. Similarly, in *Florida v. Bostick*, this Court also found significant the fact that "the police specifically advised Bostick that he had the right to refuse consent." 501 U.S. at 432. *See also Florida v. Jimeno*, 500 U.S. 248 (1991) (officer advised Jimeno that he had reason to believe Jimeno was carrying narcotics, asked permission to search, and informed Jimeno that he did not have to consent to a search of the vehicle). The reason this Court has found such advice to be significant is to dispel the belief that the person who allegedly consents was coerced into same by a law enforcement officer. That same rationale supports the Ohio Supreme Court's ruling in *Robinette*, especially in the context of motor vehicle stops, considering the emphasis law enforcement has apparently placed upon drug interdiction efforts on America's highways.

The Ohio Supreme Court specifically notes in its decision that a consensual encounter which follows

closely on the heels of a valid detention "is likely to be imbued with the authoritative aura of the detention. Without a clear break from the detention, the succeeding encounter is not consensual at all." *Robinette*, 73 Ohio St.3d at 655. The court is not so concerned with the fact of the consent itself as it is with establishing some type of demarcation between a detention and a consensual encounter **for the benefit of motorists** who are routinely being confronted with requests to search their vehicles. The Ohio Supreme Court determined, and rightfully so, that the ordinary motorist has a right to be free from unreasonable searches and seizures. The imposition of the advisory requirement on law enforcement personnel does nothing more than protect that right.

The United States, as Amicus, urges that factors other than being informed that one is free to leave may bear decisively upon whether a reasonable person would feel free to leave. United States Brief at 18. According to the United States, these factors include whether the officer has returned the motorist's documents, whether the officer has "completed the traffic stop" by issuing a warning or ticket, whether the officer displays accoutrements of authority, and the officer's statements, tone, position, and manner towards the motorist. However, when one reviews the cases cited by the United States in support of its totality of the circumstances argument, it is clear that at least the Tenth Circuit has determined that return of a driver's documents are "necessary" before that Circuit will find that a seizure has terminated. *See e.g., United States v. Lee*, 73 F.3d 1034 (10th Cir. 1996) (driver still seized at time consent obtained as deputy still possessed driver's documentation); *United States v. Sandoval*, 29 F.3d

537 (10th Cir. 1994) ("We have also considered as a necessary (but not always sufficient) condition of the termination of the seizure the officer's return of such documentation . . . . "); *United States v. Werking*, 915 F.2d 1404 (10th Cir. 1990) (investigative detention was concluded when papers were returned to detained driver). Thus, the Tenth Circuit has apparently drawn its own unchallenged "bright line" for determining whether or not a seizure has ended.

Even more interesting is the United States' citation of *United States v. Rivera*, 906 F.2d 319 (7th Cir. 1989). In *Rivera*, the court found that Rivera was not seized at the time the trooper informed him of the drug interdiction effort, asked him about drugs, weapons, and contraband, and requested consent to search. The Seventh Circuit found it very significant that Rivera "had all his identification, **he was told that the investigation was over**, he was free to leave at his pleasure and, indeed, was leaving when the trooper popped the question of consensual search." *Id.* at 323. As Rivera had been given his "cue to leave," the court found that the detention relating to the traffic offense was over. *Id.* No such "cue to leave" was given to Respondent in the case at bar.

Waiver of an individual's fundamental right to be free of unreasonable searches and seizures must not be taken lightly. Citizens cannot "meaningfully be said to have waived something so precious as a constitutional guarantee without ever being aware of its existence." *Schneckloth*, 412 U.S. at 277 (Brennan, J., dissenting). The advisory requirement is **not** a "Miranda-like" warning as urged by Amici but, rather, is a very simple phrase: "At this time, you are legally free to go." It is, however, a

prophylactic rule, as acknowledged by Petitioner and its supporting Amici, in the sense that it is designed to defend or guard against an unreasonable interference with the citizen's liberty.[7]

This rule does not prohibit an officer from then inquiring of the individual whether or not they are carrying any illegal drugs, weapons, or contraband. Indeed, there may be times within the context of a legal detention wherein questioning about matters unrelated to the initial stop may be permissible based upon an officer's observations, which give rise to some new particularized suspicion that the detained individual is engaged in other criminal activity. The required advice also does not prevent an officer from obtaining the motorist's consent to search his vehicle. The advice does clarify for the citizen that the detention has ended, by making the motorist aware that he or she is free to leave and does not have to suffer further questioning at the unfettered whim of a law enforcement officer. The statement thus comports in every sense with the constitutional criteria previously advanced by this Court.

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[7] Such a rule is not different in its objective than the exclusionary rule set forth by this Court in *Mapp v. Ohio*, 367 U.S. 654 (1961) or the warning requirement enunciated in *Miranda v. Arizona*, 384 U.S. 436 (1966). *See also* Brief of Amicus, Ohio Association of Criminal Defense Lawyers, at pp. 12-13.

B. The warning requirement imposed by the Ohio Supreme Court does not place an undue burden upon law enforcement officers, nor does it interfere with their right to make consensual inquiries of a person detained for a traffic violation.

The requirement imposed by the Ohio Supreme Court is quite simple: "At this time, you are legally free to go" (or words of similar import). The statement must be made by the officer at the conclusion of a detention for a motor vehicle violation. Amici, however, would elevate this simple requirement to the level of Miranda warnings required to be given to a person who has been taken into custody or arrested by a police officer. Quite simply, the state court requirement falls far short of such a warning.

Petitioner and Amici cite *Florida v. Royer* for the proposition that consensual encounters between police and citizens do not implicate any Fourth Amendment rights:

> [L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, **by asking him if he is willing to answer some questions**, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions.

460 U.S. at 497. However, there are some important distinctions between the *Royer* factual scenario and the facts of this case. Newsome did not just approach Respondent on a street somewhere and ask him **whether** he would be willing to answer some questions before putting the questions to him. Respondent was clearly seized by Newsome within the meaning of the Fourth Amendment and the

Ohio Constitution. Newsome, knowing that the purpose of his stop of Respondent had been completed, removed him from his vehicle, placed him in front of a video camera, and issued his warning for speeding. Then, without any further justification and under the guise of a "consensual encounter," Newsome proceeded to question him about drugs, weapons, and contraband. The phrasing of the question is such that Respondent is compelled to answer **before** he leaves. In the face of Respondent's negative answer, Newsome then requests permission to search his vehicle. The reasonable inference to be drawn is that the officer does not believe Respondent, therefore a search is necessary.

The concern eloquently expressed by the Ohio Supreme Court is how to delineate for its citizens when the detention has ended, thus recognizing the privacy rights of the traveling public, as well as the legitimate interests of law enforcement. The United States suggests that it is unreasonable to place such a "burdensome and mechanical" requirement upon a law enforcement officer. It is not unreasonable, however, nor is it burdensome to require that a state's sworn officers protect a citizen's constitutionally guaranteed rights. What is unreasonable is the fiction indulged in by Petitioner and Amici that the imposition of this requirement is a burdensome and mechanical requirement to place on law enforcement personnel. Further, it is disingenuous to urge ignorance of an individual's constitutional rights as an effective law enforcement tool. The Fourth Amendment addresses specifically the rights of "the people," not the rights of law enforcement personnel. While many individuals

know generally that they are possessed of certain constitutional rights, most could not enumerate those rights nor could they state the parameters of those rights. The Ohio Supreme Court holding clarifies the parameters of a citizen's right to be free of unreasonable searches and/or seizures following detention for a motor vehicle violation.

The Fourth Amendment and its counterpart under the Ohio Constitution are designed to protect the people against arbitrary governmental intrusions, not vice versa. The burden to insure against such intrusions was originally placed upon law enforcement in the earlier decisions of this Court by requiring that the police have probable cause to question an individual before detaining him. Probable case was whittled away into the stop and frisk doctrine of *Terry*. That doctrine was then expanded into other contexts such as the motor vehicle stop, considered a seizure for purposes of Fourth Amendment analysis. *See Berkemer v. McCarty*, 468 U.S. 420 (1984); *Delaware v. Prouse*, 440 U.S. 648 (1979). Under that line of cases, law enforcement personnel are permitted to stop and question an individual, however, their right to do so is limited: they must have a reasonable and articulable reason for doing so.

Recent cases, however, seem to have shifted the burden of insuring against arbitrary governmental intrusions from the state to the citizen. In cases such as *Mendenhall*, this Court has suggested that whether or not a seizure has occurred depends upon the totality of circumstances and whether the mythical objective reasonable person would have felt free to leave. *See Mendenhall*, 446 U.S. at 554. In a *Mendenhall* world, a police officer is allowed to

accost an individual, ask questions in a noncoercive manner, and the citizen is supposed to know that she is free to ignore the officer and walk away. *See* Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 Cornell L. Rev. 1258, 1300-01 (1990). Thus, the burden has been shifted to the individual to protect her own rights. In the real world, however, it is unlikely, if not unrealistic, to assume that a detained individual will feel free to ignore an officer and walk away. *Id.* at 1301; *see also Berkemer*, 468 U.S. at 436.

It is not suggested that the consensual encounter doctrine plays no part in effective law enforcement, however, there are some distinctions to be drawn between the rationale in cases such as *Mendenhall* and *Royer* and the type of traffic stop at issue in this case. In a *Royer* world, the officer approaches the individual on the street or elsewhere and first asks an individual **whether or not** she is willing to answer some questions. The question itself alerts the individual to ask herself this question: "Do I have to answer these questions?" If verbalized to the officer, the officer must then truthfully respond, "No, you do not have to and you are free to go." (quite similar to the requirement imposed by the Ohio Supreme Court). The request by the officer in a *Royer* case has not been preceded by a detention caused by the person's own acts in violating the law and thus is deemed by this Court to be truly consensual thus implicating no Fourth Amendment concerns.

In a traffic stop case, however, there is an initial detention which is normally valid based upon the perceived traffic infraction. It is well-settled by this Court that the detention is a seizure for Fourth Amendment

purposes. See *Berkemer, supra*, 468 U.S. 420 (traffic stop akin to *Terry* stop). However, there are parameters for such stops, e.g., reasonable and articulable suspicion of criminal wrongdoing. If no further reason for questioning becomes apparent during the traffic stop, then the detained motorist must be allowed to travel on. It is when the documents are returned, citations or warnings are issued, the conversation continues, and a request for consent is made that questions such as that in the case at bar arise. The motorist, who momentarily may have thought he was free to travel on after receiving his warning or citation, is suddenly confronted with the officer's unfounded suspicion that he is engaged in some other type of illegal activity. He has been asked to consent to a search of his vehicle and possessions for some reason unapparent to him.

Petitioner maintains that the Ohio Supreme Court's holding demonstrates no confidence in the citizen and demonstrates a belief that officers, left to their own devices, will not honor the Fourth Amendment. Depending upon the sophistication of the motorist, however, he is placed in a position of compromise. While one motorist may simply decline and take the risk that he will walk away with no further action taken by the officer, another motorist, however, may be placed in the position of waiving Fourth Amendment rights, of which he may well be unaware, under what some courts will determine in hindsight was no more than "voluntary cooperation" with the officer. However, it is without question that the officer retains the upper hand during the entire timespan of the stop. There is nothing to prevent the officer from changing a warning to a citation should the motorist decline.

Should the motorist decline, there is nothing to prevent the officer from citing the motorist for other minor or technical violations that might have been overlooked had the motorist consented. If the motorist has a prior criminal record, he may believe that if he does not consent, further action may be taken against him. These concerns underscore both the necessity and practicality of advising a motorist that the detention for the moving violation is over. The ordinary citizen should not have to be a constitutional scholar as a prerequisite to exercising his right to travel the highways and in maintaining his right of privacy.

The Ohio Attorney General, as Amicus, fears that the decision of the Ohio Supreme Court will have severe consequences for local drug interdiction efforts. In support of its argument, Amicus contends that in 1994 and 1995 alone, Ohio police officers instituted 408 narcotics prosecutions based upon evidence obtained via consent searches. The Attorney General also claims that between 1992 and 1995, in twenty (20) cases in which consent was sought from motorists ("car" cases), Ohio Highway Patrol officers confiscated drugs and currency worth $5,347,988. The Attorney General's brief is notably silent about the hundreds, perhaps thousands, of cases in which vehicles were searched under the guise of "voluntary cooperation" and at the inconvenience of the motorist where no contraband, weapons, currency, or drugs were found. This result-oriented argument provides no insight to the underlying constitutional inquiry. It does, however, remind us of the mindset of police agencies who are more concerned with results (quantity and value seized) than with constitutional guarantees. These police guideposts

are indicative of "the end justifies the means" mentality, a concept that is totally foreign to our system of justice.

Whether or not the consensual encounter doctrine is an effective law enforcement technique is not at the heart of this case and, even if it were, "the effectiveness of a law-enforcement technique is not proof of its constitutionality." *Bostick*, 501 U.S. at 40 (Marshall, J., dissenting). The Ohio Attorney General and the United States would elevate the Ohio Supreme Court's ruling to a mandate against the consensual encounter doctrine, but that simply is not the case. The bottom line is that the holding does not preclude utilization of the consensual encounter to ferret out drug-related activity on the highway. It only requires that the officer advise the motorist that the motor vehicle infraction has been disposed of before launching into new and uncharted waters.

C. A state may interpret its own state constitution so as to provide its citizens with greater protection of the fundamental right to be free of unreasonable searches and seizures without offending federal Fourth Amendment jurisprudence.

The Ohio Supreme Court premised its holding in this case upon both the Fourth and Fourteenth Amendments to the United States Constitution, as well as Section 14, Article I of the Ohio Constitution. This Court has repeatedly advised state courts that they may construe their own constitutions to provide broader individual liberties than those provided under the federal Constitution. For example, in *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 293 (1982), this Court noted that:

> [A] state court is entirely free to read its own State's constitution more broadly than this Court reads the Federal Constitution, or to reject the mode of analysis used by this Court in favor of a different analysis of its corresponding constitutional guarantee.

Likewise, this Court has advised state courts that they may "construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution." *California v. Greenwood*, 486 U.S. 35, 43 (1988). *See also Michigan v. Long* 463 U.S. 1032, 1068 (1983) (Stevens, J., dissenting) (state may provide greater protection to one of its citizens than some other state may provide or than this Court may require throughout the country).

The Ohio Supreme Court has also recognized this premise in the context of individual rights:

> The Ohio Constitution is a document of independent force. In the areas of individual rights and civil liberties, the United States Constitution, where applicable to the states, provides a floor below which state court decisions may not fall. As long as state courts provide as much protection as the United States Supreme Court has provided in its interpretation of the federal Bill of Rights, state courts are unrestricted in according greater civil liberties and protections to individuals and groups.

Arnold v. Cleveland, 67 Ohio St.3d 35 (1993) (syllabus at 1). The advisory requirement imposed by the *Robinette* court does nothing more than provide greater protection to Ohio motorists pursuant to Ohio's state constitution.

The right guaranteed to the individual is the right to be free of unreasonable searches and seizures. That right is protected by Section 14, Article I of the Ohio Constitution. The issue addressed by the Ohio Supreme Court below is how best to protect the right of motorists in Ohio to be free from such unreasonable searches and/or seizures when the search follows an initial detention for a motor vehicle infraction. The Ohio Supreme Court was fully aware of the widespread practice of officers in Ohio to seek consent to search without any basis during the course of a routine stop for a motor vehicle violation. The determination of the Ohio Supreme Court is that the motorist is best protected by being informed. Thus, it imposed a requirement on officers that they must inform a motorist, at the conclusion of the traffic matter, that the motorist is legally free to leave.

Respondent joins fully in the Amicus brief filed on his behalf by the Ohio Association of Criminal Defense Lawyers with regard to the existence of an adequate and independent state ground as the underlying basis for the Ohio Supreme Court's holding. Twice, within the body of its opinion, the Ohio Supreme Court found its rule to be warranted by the Ohio Constitution. The holding does not deprive an individual of an important constitutional privilege or right. Rather, it protects the fundamental right to be free of unreasonable searches and/or seizures, a right embodied in the Ohio Constitution. Certainly, the Ohio Supreme Court is empowered to interpret its own Constitution to "overprotect" this fundamental right.

CONCLUSION

This Court constitutes our foremost judicial authority on fundamental constitutional guarantees. No right is held to be more sacred in our society than the right to be secure in one's privacy against arbitrary intrusion by the police. However, such arbitrary intrusion lies at the very heart of the police practice at issue, a practice which allows law enforcement officers to turn every routine motor vehicle stop into a full blown search for unrelated criminal activity without articulating any basis therefor. The Ohio Supreme Court correctly determined that Respondent was still seized at the time his purported consent was given and held that his consent was thus ineffective as a matter of law. The Ohio Supreme Court further recognized the arbitrary nature of exposing a motorist to such an unreasonable and unjustified interference with his liberty before being allowed to proceed on his way after a motor vehicle violation. In order to protect the motorist from this unreasonable and unjustified interference, the court imposed a warning requirement upon law enforcement officers. The decision of the Ohio Supreme Court is not offensive to either the federal or Ohio constitutions and, as such, the decision should be affirmed by this Court.

Respectfully submitted,

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APPENDIX

IN THE COMMON PLEAS COURT OF
MONTGOMERY COUNTY, OHIO

STATE OF OHIO,

Plaintiff,

-vs- Case No. 92-CR-2800

ROBERT D. ROBINETTE,

Defendant.

TRANSCRIPT OF VIDEOTAPE

of JOINT EXHIBIT A, a videotape, in the proceedings that came before the Honorable John B. Kessler, Judge, on the 26th day of February, 1993.

HOOVER REPORTING
Susan C. Hoover, RPR
Troy, Ohio
(513) 335-3008

* * *

[p. 3] Interstate 70
Dayton, Ohio

August 3, 1992
8:30:22 p.m.

Dispatch: (Inaudible.)

Officer Newsome: What do you do for a living?

Mr. Robinette: I work for International Paper.

Officer Newsome: Okay.

Since you live in Montgomery County, and you're almost at the end of your trip, I'm going to cut you some slack. Okay?

Mr. Robinette: I didn't see the sign was dropped down.

Officer Newsome: If you have been watching the news you know we've been having a lot of problems with accidents up here, one right after another. We just want to get everyone to slow down. We have been writing a lot of tickets, though.

One question before you get gone: are you carrying any illegal contraband in your car? Any weapons of any kind, drugs, anything like that?

Nothing like that? Okay.

[p. 4] Is all the luggage in there both yours and his? All of it? Okay.

Would you mind if I search your car? Make sure there's nothing in there?

Wouldn't have any problem with it?

Why don't you step up here on the passenger side, right up here. Come on over here. Come out, please. Okay.

If you would both of you stand about ten feet in front of your car there and face the other way.

Dispatch: (Inaudible.)

Officer Newsome: Little bit further, if you would.

Dispatch: (Inaudible.)

Officer Newsome: Move up a little bit further, if you would.

That's fine. Right there. Thanks.

(Searching.)

Dispatch: (Inaudible.)

Dispatch: 308 (inaudible.)

Dispatch: (Inaudible.)

Officer Newsome: Is that all the marijuana you got?

Mr. Robinette: Console.

Officer Newsome: Okay.

Officer Newsome: Okay.

* * *